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In the

Supreme Court of the United States

October Term, 1970

HONORABLE BERNARD M. DECKER,
UNITED STATES DISTRICT JUDGE, et al.,
Petitioners,

vs.

HARPER & ROW PUBLISHERS, INC., et al.,
Respondents.

On Writ of Certiorari to The United States Court of Appeals for The Seventh Circuit

REPLY BRIEF

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REPLY BRIEF

Defendants and their *amici* have reacted to the District Court's decision as if it meant the demise of corporate enterprise, and the end of corporate representation by the legal fraternity. But the hypothetical and extravagant contentions made in support of expanding the attorney-client privilege to cover all corporate employees should not obscure specific legal issues involved in this proceeding.

The first question to be dealt with is whether the Seventh Circuit misused the writ of mandamus to review the District Court's discovery ruling. Defendants have not argued that the District Court clearly abused its discretion by ordering production of the debriefing statements taken by counsel from corporate employees concerning their grand jury appearance. Indeed, such an assertion cannot be made in view of the fact that the District Court based its decision upon substantial federal precedent. While defendants attach "extraordinary importance" to the disputed legal issue with respect to the scope of the attorney-corporate client privilege, this offers no basis to circumvent the regular process of appellate review.

Passing this threshold issue, the District Court's decision must be considered in appropriate perspective. The District Court recognized the attorney-corporate client privilege, but limited its application to those officials having responsibility over the corporate matters upon which the attorney is consulted. The control group test, as applied by the District Court, protects communications between counsel and those executives, officers or other management personnel who are in a position to make corporate decisions or fix litigation strategy. These are the only individuals who may be deemed to constitute the corporate client in accordance with the traditional rationale of the attorney-client privilege. None of the broad policy arguments made by defendants (Brief of Respondents 25-26) justifies extension of the privilege indiscriminately to all corporate employees.

THE CONTROL GROUP STRIKES AN APPROPRIATE BALANCE BETWEEN THE NEED FOR DISCLOSURE AND THE REASONS FOR AN ATTORNEY-CORPORATE CLIENT PRIVILEGE

While there are strong reasons for making the attorney-corporate client privilege a qualified one, and for abolishing the privilege altogether, this case concerns solely the District Court's ruling that the privilege can only be invoked as to communications between the corporate counsel and the effective control group.

Defendants have asked this Court to expand a rule of privilege that admittedly prevents disclosure of crucial information in the course of litigation. As this case forcefully demonstrates, the privilege results in the suppression of information necessary to proper judicial determinations. On the other hand, the supposed collateral benefits of the privilege are highly speculative and doubtful.

A. The evils of the privilege are substantial.

The need for discovery of debriefing statements—and the reason for resisting production—arises from the unavailability of this highly relevant material through alternative sources. Examination of witnesses themselves and inspection of corporate records give neither a full nor accurate picture of the alleged price-fixing conspiracy. Much of the illegal activity was not memorialized by the corporate employees who engaged in it. Many documents have disappeared as a result of regular corporate record destruction policies or otherwise. As may be expected in any complex case, the lapse of time between pretrial discovery and the crucial incidents in the price-fixing conspiracy has made witnesses unavailable[1] and erased the recol-

[1] At least one crucial witness, *i.e.*, James Heidelberger, whose debriefing statement is at issue, has died since his grand jury appearance.

lection of many witnesses. Moreover, from a comparison of several grand jury and deposition transcripts, the District Court concluded that witnesses were being "deliberately evasive" during their interrogation in these proceedings. Those debriefing statements obtained by plaintiffs further reveal instances in which witnesses were encouraged to give misleading testimony before the grand jury.[2] The theoretical assertion that "the same avenues of discovery are open to" the plaintiffs as were used by defense counsel (Brief of Respondents 14) cannot stand against these hard facts.

The record in this case belies the attempt to minimize the significance of the material which would be concealed if the attorney-corporate client privilege were extended, as urged by defendants.[3]

Since the corporation enjoys no privilege against self-incrimination, its records and employees are subject to examination by counsel. *United States* v. *Kordel*, 397 U.S. 1 (1970); *United States* v. *White*, 322 U.S. 694 (1944). Consequently, the attorney-corporate client privilege operates to protect facts that have been forgotten, altered or concealed. A great potential for abuse exists in these circumstances. The blanket application of the privilege would enable employees to suppress or withhold information previously disclosed to corporate counsel

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[2] Illustrative excerpts from the debriefing statement of Clarence N. Roland are quoted in the Brief of Petitioners, p. 35. This vitiates defendants' contention that access to the grand jury transcripts erases the need for plaintiffs to examine the debriefing statements. (Brief of Respondents 48)

[3] Although defendants argue that the privilege conceals nothing from corporate adversaries, they concede the significance of the debriefing statements to the ascertainment of facts by the plaintiffs. (Brief of Respondents 14-15, 47-49)

without fear of impeachment, and thereby defeat the ends of justice. Given the volume of business conducted through corporations in this country, the injurious effect of extending the privilege would be severe.

The defendants (and their *amici*) concede that the privilege may be used to suppress the truth, but argue that justice in the adversary process must be sacrificed to perpetuate an atmosphere of secrecy, reminiscent of a medieval guild, which is supposedly necessary for attorneys to persuade their corporate clients to obey the law.[4] In the face of a record showing that attorneys not only took advantage of prevarication by deposition witnesses, but encouraged evasion by these witnesses, it is hypocritical to contend that an area should be reserved for private law enforcement by corporate attorneys.[5] This contention runs counter to the entire philosophy of the increasingly more liberal pretrial discovery rules. The outcome of a case should not be changed by interposing attorneys between the injured parties and their access to the facts.

On the contrary, we urge that full disclosure of facts and the consequent enforcement of the law where violations are established will act as a deterrent to further illegal acts, and thus achieve greater compliance with the law. Such discovery is especially necessary for effective

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[4] *E.g.*, Brief of Respondents 27; American Bar Ass'n Br. 8; New York City Bar Ass'n Br. 10.

[5] A typical expression of this treme may be found in the brief of the Illinois State Bar Association:

> "In a period when growing disrespect for law is a matter of national concern, it would be contrary to the public interest to cripple, if not effectively destroy, the role that the members of the legal profession have in achieving voluntary compliance with business laws and regulations." (at p. 3).

private enforcement of the antitrust laws. See *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965)

B. The supposed benefits of the privilege are illusory.

The defendants (and their *amici*) reiterate variations of the following policy argument for expansion of the attorney-corporate client privilege to cover communications from all employees:

> The absence of the privilege would impair the legal representation of corporations because corporations would be reluctant to consult attorneys or to disclose the facts underlying controversies to their counsel.

This case offers a unique opportunity to test these theoretical assertions against the actual situations that the privilege encourages.

Defendants argue that the sheer size of corporations, the number of their employees, and the continuous involvement of attorneys in corporate affairs create added policy reasons to extend the attorney-personal client privilege to the entire corporate structure. (Brief of Respondents 13, 23) But a corporation, outside of possibly management personnel who are responsible for making decisions on which legal advice is sought, cannot be mechanically equated with an individual for purposes of the attorney-client privilege. The communications between the many corporate employees and counsel do not occur in the atmosphere of confidentiality which the attorney-client privilege requires and was designed to foster.*

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*The touchstone of the attorney-client privilege is confidentiality. See *Cafritz* v. *Koslow*, 167 F.2d. 749, 751 (D.C. Cir. 1948).

Defendants seek to justify the blanket application of the privilege as necessary to promote free communication between employees and corporate counsel. (Brief of Respondents 21-22) But it is not logical to assume that an individual employee will be encouraged to make a *more* frank and full disclosure of facts to corporate management merely because a corporate attorney receives a copy of his report. The realities of corporate life are convincing that when a corporate executive calls for information, he gets it. Most intra-corporate memoranda are candid and complete, if not confidential, without regard to possible immunity against disclosure.

Attorneys occupy essentially the same position in the corporate hierarchy as executives with respect to obtaining full and accurate reports from subordinate employees. The corporate attorney is no longer an independent adviser occasionally consulted on matters of great personal importance. For all practical purposes, he is an officer involved in the myriad details of operating a business. The occasional has become commonplace. To insulate from examination every matter in which a corporate attorney has been involved would be to suppress much of the relevant information about the corporation's activities.

The reasons for which this Court has denied the privilege against self-incrimination to corporations militate strongly against the blanket imposition of the attorney-corporate client privilege to employees at all levels. The doctrine of confidential communications involves the personal rights of individuals to consult attorneys for legal advice. There is no way in which a corporation can behave so as to come within these personal privileges. This Court has held that individual representatives of an organization have no privilege to withhold its official

records and documents "even though production of the papers might tend to incriminate them personally." *United States v. White*, 322 U.S. 694, 699 (1944); *Wilson v. United States*, 221 U.S. 361, 382 (1911).[1] The expansion of the attorney-corporate client privilege as urged by defendants would achieve precisely the result that has been condemned in cases refusing to grant corporations the privilege against self-incrimination.

The admonition in *Hale v. Henkel*, 201 U.S. 43, 70 (1906) is particularly appropriate to this case:

> "As the combination or conspiracies provided against by the Sherman antitrust act can ordinarily be proved only by the testimony of the parties thereto, in the person of their agents or employees, the privilege claimed would practically nullify the whole act of Congress."

These considerations were strongly reaffirmed in *United States v. White*, 322 U.S. 694, 700 (1944):

> "The greater portion of evidence of wrongdoing by an organization or its representatives is usually to be found in the official records and documents of that organization. Were the cloak of the privilege to be thrown around these impersonal records and documents, effective enforcement of many federal and state laws would be impossible."

No reason has been adduced why documents that corporations are not permitted to conceal by assertion of the

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[1] The absence of a corporate privilege against self-incrimination—even though the corporate documents may incriminate the individual who executed them—makes it fallacious to argue that the lack of a blanket attorney-corporate client privilege would be destructive of the individual employee's privilege against self-incrimination. (American Bar Ass'n Br. 9-11)

constitutional privilege against self-incrimination should, nonetheless, receive absolute protection under a rule having far less justification. Being a creature of the state, the corporation's right to invoke an attorney-client privilege must remain subject to the ultimate authority of the government to ensure compliance with the laws. This public interest will not permit a corporate defendant, such as the present ones, to conceal its operations behind the privilege in such a way as to mock the judicial process and defeat justice.

A litigant should not be denied access to facts gathered by counsel from corporate employees below the management level for fear that the remote prospect of such judicially supervised discovery would make corporations reluctant to hire lawyers.[8] In any event, this concern is unfounded. If, as defendants bemoan, the operation of corporate enterprises requires almost constant legal advice, corporations are not going to eschew lawyers simply because the facts memorialized by counsel may be subject to discovery in the course of judicial proceedings, no more than corporations would stop keeping necessary records of their policies and practices.

One cannot quarrel with the prediction that some attorneys may destroy or improperly withhold their memoranda from discovery. (American Bar Ass'n Br. 6) But to cite this possibility as a reason for expanding the absolute protection of the attorney-client privilege is like argu-

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[8] The supposition that a broad privilege may be useful to attorneys in securing clients offers no valid basis to extend, or recognize, the attorney-corporate client privilege. The issue ought certainly not to be whether the secrecy afforded by the privilege would advantage the bar or promote professional engagements.

ing for repeal of Rule 34 because some counsel may advise corporate officers to destroy intra-departmental communications which incriminate the company.

The defendants contend that absence of an attorney-corporate client privilege may unfairly penalize corporations which seek legal advice but nonetheless violate the law. Counsel's ability to induce voluntary compliance with the law would be frustrated, so the argument runs, if corporate adversaries were given access to facts collected by counsel concerning the illegal pratices that he warned against. But the Court of Appeals for the Fifth Circuit recently rejected the argument "that the prospective decision of the client on whether to abide by advice or disregard it, or the guarantee of a veil of secrecy, either establishes or narrows the attorney's obligation in the giving of advice. And to grant to corporate management plenary assurance of secrecy for opinions received is to encourage it to disregard with impunity the advice sought." *Garner* v. *Wolfinbarger*, 430 F.2d 1093, 1102 (5th Cir. 1970). If a corporate client persists in its unlawful activity after counsel's advice, such a law violator should not be protected from punishment by unreasoned barriers to the discovery of all relevant facts.

Just as the application of the attorney-corporate client privilege cannot depend upon whether the corporation was acting upon counsel's advice, the scope of the privilege should not turn upon whether the employee furnishes information to corporate counsel at the direction of his superiors.[9] This test, fashioned from whole cloth by the

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[9] Such a test would lead to the anomalous result that the corporation could suppress as privileged an employee's report of his illegal activities, and then argue without

Seventh Circuit, would make the privilege susceptible to unbridled abuse. The corporation could simply direct all employees to channel their regular business reports through corporate counsel, and thereby immunize any communication attributable to a corporate purpose. Such a result would offend whatever reason and authority exists for the privilege.

Analysis of the attorney-corporate client privilege in ordinary agency terms, pressed by defendants (Brief of Respondents 17-19) and adopted by the Seventh Circuit, begs the significant question: For what purpose may the employee be deemed an agent? To qualify as confidential within the meaning of the privilege, a communication must have been made for the purpose of securing legal advice. But the grand jury witnesses employed by defendants did not seek or receive legal advice on behalf of the corporation. (Appendix pp. 15a-17a). The employees were merely interviewed by attorneys for factual information about the grand jury investigation that the attorneys thought might be useful to their corporate clients. The employees in this situation were no different than any other witness.

C. There is no authority for the expansion of the privilege sought by defendants to include employees below the control group.

The defendants offer neither valid policy reasons nor relevant authority for departure from the standards developed in *City of Philadelphia* v. *Westinghouse Electric*

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* (Continued)

fear of contradiction that the employee's conduct was contrary to alleged corporate policy. See *Di-Wal, Inc.* v. *Fibreboard Corp.*, 1970 CCH Trade Cases ¶ 73,155, at pp. 88,556-7 (N.D. Cal. 1970) (summary judgment for defendant based in part upon company's published policy to comply with the antitrust laws).

Corp., 210 F. Supp. 483, 485 (E.D. Pa. 1962); *Natta* v. *Hogan*, 392 F.2d 686, 692 (10th Cir. 1968); and *Garrison* v. *General Motors Corp.*, 213 F. Supp. 515 (S.D. Cal. 1963), which define the breadth of the attorney-corporate client privilege as limited to those individuals in a position to direct corporate action on the legal advice allegedly sought.[10] While defendants have catalogued state cases extending the privilege to accident reports from corporate employees (Brief of Respondents 34-36), there is strong state authority to the contrary. *E.g.*, *Day* v. *Illinois Power Co.*, 50 Ill. App. 2d 52, 199 N.E.2d 802, 806 (1964); *Golminas* v. *Fred Teitelbaum Construction Co.*, 251 N.E. 2d 314, 317 (Ill. App. Ct. 1969).[11] In any event, federal rules of privilege should be applied to protect the essential character and integrity of the fact-finding processes in cases arising under federal law. See *Garner* v. *Wolfinbarger*, 430 F.2d 1093, 1099-1100 (5th Cir. 1970).

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[10] None of the earlier federal decisions cited by defendants were required or undertook to delineate the scope of the claimed privilege. Still, these decisions recognized that no privilege attaches to a communication unless made by the person involved for the purpose of securing legal opinion or services. *E.g.*, *Paper Converting Machine Co.* v. *FMC Corp.*, 215 F. Supp. 249, 251 (E.D. Wis. 1963) (ruling with respect to Item 1); *United States* v. *American Radiator & Standard Sanitary Corp.*, 1958 CCH Trade Cases ¶ 68,954, p. 73,833 (W.D. Pa. 1958).

[11] The defendants lay particular stress upon the decision in *D. I. Chadbourne* v. *Superior Court*, 388 P.2d 700 (Cal. 1964). Yet in that case the court concluded there was no showing that the statement of the interviewed employee "emanated from him in his capacity as a spokesman for the corporation" (at 708) or that he spoke with any intention or expectation of confidentiality. Consequently, the court refused to disturb the trial judge's finding "that the statement was not protected by the attorney-client privilege." (at 711)

The competing interests in this area were weighed by the distinguished and disinterested committee preparing the Proposed Rules of Evidence for the United States District Courts and Magistrates. Its preliminary draft (March 1969) recommends the control group test, as applied by the District Court, to define the attorney-corporate client privilege. 46 F.R.D. 249-253. Since the privilege suppresses relevant facts, the interests of justice require that the privilege be carefully interpreted and strictly confined. The well reasoned decision of the District Court limits the detrimental effects of the privilege, but still protects legal counseling by corporate lawyers in accordance with the appropriate and traditional purpose of the attorney-client privilege.

Respectfully submitted,

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